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IN THE

Supreme Court of the United States

January Term, 1961

No.

GEORGE SABA and EDWARD D. FEURTADO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. THE OPINIONS BELOW.

The judgment of the United States District Court for the Southern District of Florida in a civil proceeding, denying the motion of the petitioners herein for the return of seized property and for the suppression of the property for use as evidence in any proceeding, has not been reported and is printed in "Appendix A" hereto. The

opinion of the Court of Appeals for the Fifth Circuit, dismissing the appeal taken to that Court, is reported in 282 F. 2d 255, and is printed in "Appendix B" hereto.

B. GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The judgment of the Court of Appeals sought to be reversed was dated and entered on the 12th day of October, 1960.

2. A rehearing was requested by the petitioners in the Court of Appeals, which was denied.

3. No extension of time to petition for certiorari has been requested or granted.

4. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. 1254(1).

C. QUESTION PRESENTED.

Where the petitioners in the District Court, pursuant to the provisions of Rule 41(e), FEDERAL RULES OF CRIMINAL PROCEDURE, move for the return of seized property and for the suppression thereof for use as evidence against them, prior to indictment or information being filed, and the District Court having treated the proceeding as in indpendent miscellaneous civil proceeding and having by its order made findings of fact, conclusions of law, and entered judgment thereon, did the Circuit Court of Appeals for the Fifth Circuit err in dismissing the appeal taken from that order as being interlocutory in form and not appealable?

D. STATUTES AND RULES INVOLVED.

The statutes and rules involved are:

1. Title 26, U. S. C., Section 4411
2. Title 26, U. S. C., Section 4412
3. Title 26, U. S. C., Section 4901(a)
4. Title 26, U. S. C., Section 7203
5. Title 28, U. S. C., Section 1254(1)
6. Title 28, U. S. C., Section 1291
7. Rule 41(e), FEDERAL RULES OF CRIMINAL PROCEDURE
8. Rule 47, FEDERAL RULES OF CRIMINAL PROCEDURE

The applicable portions of all the foregoing are set forth in "Appendix C" hereto.

E. STATEMENT OF THE CASE.

On the 9th day of January, 1960, the United States Commissioner at Miami, Florida, upon the sworn affidavits of Special Agents of Internal Revenue Service, issued a search warrant for the premises at 1526 N. W. 33rd Street, Miami, Florida. The search warrant was executed on the 9th day of January, 1960, by leaving a copy of the warrant at the premises located at 1526 N. W. 33rd Street, together with a receipt for the items seized therein.

On the 18th day of January, 1960, the petitioner, GEORGE SABA, filed a motion for return of seized property pursuant to Rule 41(e), FEDERAL RULES OF CRIMINAL PROCEDURE. The motion for return of

seized property was supported by an affidavit of ownership by the said GEORGE SABA of property seized by virtue of the execution of the search warrant in question.

On the 21st day of January, 1960, EDWARD D. FEURTADO filed a motion for return of seized property pursuant to Rule 41(e), FEDERAL RULES OF CRIMINAL PROCEDURE, supported by his affidavit of ownership, claiming that property seized by virtue of the execution of the search warrant should be returned to him.

The motions, supported by affidavits, were filed with the Clerk of the United States District Court for the Southern District of Florida and entitled a miscellaneous civil proceeding, bearing the number 1701-M-Misc. At the time the motions, supported by affidavits, were filed, there was no pending criminal proceeding against the petitioners.

On the 29th day of January, 1960, the Honorable William C. Mathes, United States District Judge, sitting by designation, ordered pending motions in the miscellaneous civil proceeding to be heard before him at the Federal Building, Miami, Florida, said hearing to be conducted on the 5th day of February, 1960. The United States of America moved to dismiss the pleadings filed in the miscellaneous civil proceeding.

On the 5th day of February, 1960, a hearing was had before the Honorable William C. Mathes upon the motions of the petitioners, said hearing being continued to the 12th day of February, 1960, and on the 29th day of

February, 1960, the Honorable William C. Mathes entered a final judgment in the miscellaneous civil proceeding, incorporating therein his findings of fact and conclusions of law, denying the motions of the petitioners, GEORGE SABA and EDWARD D. FEURTADO, for the return of seized property and the suppression of its use as evidence against them. It was from this final judgment in the miscellaneous civil proceeding, dated the 29th day of February, 1960, that the petitioners prosecuted their appeal in the Fifth Circuit Court.

On the 8th day of February, 1960, during the pendency of the hearing upon the motions filed by the petitioners herein, the UNITED STATES OF AMERICA, by an Assistant United States Attorney, filed an information charging the petitioners with a violation of Title 26, U. S. C., Sections 4411, 4412, 4901(a) and 7203.

F. REASONS FOR GRANTING THE WRIT.

It is respectfully submitted that a writ of certiorari should be granted herein because:

1. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE SAME MATTER;

and

2. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS

NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Rule 41 (e), FEDERAL RULES OF CRIMINAL PROCEDURE, provides as follows:

> "(e) Motion for Return of property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 47 of the FEDERAL RULES OF CRIMINAL PROCEDURE, states as follows:

"Rule 47. Motions

> "An application to the court for an order shall be made by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit."

The proceedings in the District Court were initiated by the petitioners' motions, supported by their affidavits, in conformance with Rule 41(e) and Rule 47, FEDERAL RULES OF CRIMINAL PROCEDURE. The remedy sought by the petitioners — that is, the return of seized property — is one in law, properly initiated, pursuant to the terms of Rule 41(e), by motion and affidavit and not by bill of complaint.

The motions filed by the petitioners in the below proceeding were filed on the 18th and 21st days of January, 1960, with a hearing conducted thereon on the 5th day of February, 1960, the UNITED STATES OF AMERICA moving to dismiss the pleadings on the 8th day of February, 1960, while the information was not filed until the 8th day of February, 1960, some eighteen to twenty-one days after the civil proceedings were initiated.

The District Court treated the miscellaneous proceeding as a separate and independent proceeding and entered thereon findings of fact, conclusions of law and final judg-

ment subsequent to hearings had on the petitioners' motions.

No indictment was returned, nor is there any indictment now pending against the petitioners in the District Court.

The United States Court of Appeals for the Fifth Circuit, in dismissing the petitioners' appeal to that Court from an adverse ruling of the District Court, relied upon the case of **Bonnie L. Peterson** v. **United States of America, 260** F. 2d 265, and **Zacarias** v. **United States of America, 261** F. 2d 416. It is respectfully submitted that the Peterson case supra is not applicable in that the motion to suppress in that case was filed in and as a part of a criminal proceeding in which an indictment had been returned. The second case (**Zacarias,** supra) relied upon by the Court of Appeals for the Fifth Circuit in dismissing the petitioners' appeal to that Court is in direct conflict with a decision rendered by the Court of Appeals for the Ninth Circuit, in the **Freeman** case, infra.

In the case of **Zacarias** v. **United States,** supra, the Fifth Circuit Court dismissed an appeal taken from an order of the District Court denying a motion to suppress before indictment or trial of the appellant in that case. The decision of the Fifth Circuit Court was predicated upon a criminal proceeding being instituted by the issuance of a complaint by an United States Commissioner. This, in the opinion of the Fifth Circuit Court, constituted a pending criminal proceeding, despite the fact that no indictment had been returned in that case, which rendered the order denying the return of property interlocutory in nature and not a final judgment within the meaning of Title 28, U. S. C., Section 1291.

In the case of **Freeman** vs. **United States**, 160 F. 2d 69, the Circuit Court of Appeals for the Ninth Circuit, specifically ruling opposite on that point, stated at page 70:

> "Nor is there merit in the contention that the order is interlocutory because sought after a complaint filed with the commissioner and the holding of Freeman on it for a grand jury investigation thereafter."

In the **Zacarias** case, supra, the Court of Appeals for the Fifth Circuit specifically noted the conflicting view expressed by the United States Court of Appeals for the Ninth Circuit and further, at page 417, stated:

> "No Supreme Court case has been cited to or been found by us that categorically answers this question. A rather full discussion of the reviewability of such orders is contained in **Carroll** v. **United States**, 354 U. S. 394, 77 S. Ct. 1332, 1 L. Ed 2d 1442. However, in that case, an indictment had already been found, which, of course, is not the case here."

In **Perlman** v. **United States**, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950, this Court held that an order denying the motion, before indictment, to enjoin the use of certain documents that had been impounded in previous litigation was appealable.

In the case of **Cogen** v. **United States**, 278 U. S. 221, 49 S. Ct. 118, this Court stated:

> "Motions for the return of papers and the sup-

pression of evidence made in the cause in advance of the trial, under this rule of practice, must be differentiated from independent proceedings brought for a similar purpose. Where the proceeding is a plenary one, like the bill in equity in **Dowling** v. **Collins** (C.C.A.) **10**, F. (2d) **62**, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution. Applications for return of papers, or other property may, however, often be made by motion or other summary proceeding, by reason of the fact that the person in possession is an officer of the Court. See **United States** v. **Maresca** (D.C.) **266** F. **713**; **United States** v. **Hee** (D.C.) **219** F. **1019, 1020.** Compare **Weinstein** v. **Attorney General** (C.C.A.) **271** F. **673.** Where an application is filed in that form, its essential character and the circumstances under which it is made will determine whether it's an independent proceeding or merely a step in the trial of the criminal case. The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, * * * or wherever the motion is filed before there is any indictment or information against the movant, like the motions in **Perlman** v. **United States**, * * *"

And further the Court went on to state:

"* * * And the independent character of a summary proceeding for return of papers may be

> so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court. This was true in **Essgee Co. of China** v. **United States**, 262 U. S. 151, 43 S. Ct. 514, 67 L. Ed. 917, where the petition was entitled as a separate matter and was referred to by the court as a special proceeding."

It is respectfully submitted that in the instant case the applications of the petitioners in the District Court was entitled as a separate miscellaneous proceeding, and was referred to by the District Court throughout the proceeding as a special proceeding even to the extent that the District Court made findings of fact and conclusions of law on entering final judgment in the miscellaneous proceeding.

It is noteworthy that in the **Cogen** case, supra, the application for order returning seized papers and suppression of evidence was made after the indictment was returned.

The case of **Carroll** v. **United States**, 77 S. Ct. 1332, 354 U. S. 394, 1 L. E. 2d 1442, also differentiates with respect to the appealability of an order for the suppression or return of illegally seized property being appealable at once as where the motion is made **prior to indictment.** See also **Go-Bart Importing Co** v. **United States**, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374.

It is respectfully submitted that the Circuit Court of Appeals for the Fifth Circuit, in dismissing the petitioners' appeal from an adverse decision of the District

Court, rendered in an independent miscellaneous civil proceeding, on the basis that the judgment was interlocutory in character and not final, was error, and that the Court of Appeals should have entertained the appeal of the petitioners in that Court.

CONCLUSION

UPON THE FOREGOING GROUNDS IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

J. EDWARD WORTON
Attorney for Petitioners

APPENDIX A

JUDGMENT OF THE DISTRICT COURT

Filed February 29, 1960

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 1701-M-Misc.

UNITED STATES OF AMERICA

vs

PREMISES located at 1526 N. W. 33rd Street, Miami, Florida

Findings of Fact, Conclusions of Law, and Final Judgment

This matter having come on to be heard before me this 12th day of February, 1960, on motions of respondents GEORGE SABA and EDWARD D. FEURTADO to suppress and for return of seized property, and on motion of the United States of America to dismiss the pleadings and the motions to suppress the evidence filed in this cause, and the Court having heard testimony of Special Agent Edward C. Hilker and argument of counsel for the respective parties, and having examined briefs submitted by the parties, and being otherwise fully advised in the premises, does find and hold as follows:

FINDINGS OF FACT

1. That from the testimony of the witness, Special Agent Edward C. Hilker, Intelligence Division, Internal Revenue Service, and from examination of affidavits for search warrant filed by said Edward C. Hilker and by Special Agent Salvatore C. Sparacino, dated January 9, 1960, the Court finds that Special Agent Hilker had information from a confidential source shown to have been previously reliable, that a meeting of several lottery operators was to take place at 1526 N. W. 33rd Street, Miami, Florida, on January 9, 1960; that on two previous occasions and confidential source furnished information corroborated by the surveillance of Special Agent Hilker, which indicated that meetings were being held where various lottery operators would secretly congregate at a different location in Miami, Florida each week;

2. That on Saturday, January 9, 1960, Special Agent Hilker, together with other Special Agents of the Intelligence Division, Internal Revenue Service, placed the suspected premises under surveillance at approximately 12:20 p. m., and shortly thereafter Special Agent Hilker and the other agents observed two white men arrive at the premises and carry six chairs into the premises; that at approximately 12:45 p. m. Hilker and the agents observed a white man drive a red 1957 Chevrolet bearing a 1959 Florida tag, No. 1-78080, registered to a reputed lottery operator, to the vicinity of 1526 N. W. 33rd Street, Miami, Florida, and park nearby, and that said white man was observed by the agents removing a bulging brown paper sack from the said vehicle and carry it into the said premises, and that said aforedescribed vehicle

had been seen by Special Agent Hilker on the two previous weeks at suspected meeting places of lottery operators; that immediately thereafter Hilker left his place of surveillance and proceeded to obtain a Federal search warrant for the said premises from United States Commissioner Roger E. Davis;

3. That when Special Agent Hilker returned to the vicinity of the premises at approximately 3:00 p.m., after having obtained the search warrant and prior to executing it, he did personally observe various automobiles in the vicinity of 1526 N. W. 33rd Street, Miami, Florida, known by him to be registered in the names of persons having reputations of being lottery operators in the Miami area, and having been observed by Hilker on two previous occasions, as set forth in his affidavit for search warrant; that in addition, the other Special Agents who had said premises under surveillance under Hilker's absence informed Hilker that several persons were observed by them entering the premises, who had arrived in said automobiles, and that some of these persons carried bulging brown paper sacks into the said premises; that James Christian, a known lottery operator holding a current Federal Wagering Stamp, was also seen entering the premises;

CONCLUSIONS OF LAW

1. That the arrest of respondents, GEORGE SABA and EDWARD D. FEURTADO, is a valid arrest, and that the search made was a reasonable search within the Fourth Amendment of the Constitution, being made incident to a lawful arrest;

2. That when Special Agent Hilker executed the search warrant at the premises located at 1526 N. W. 33rd

Street, Miami, Florida, he had sufficient information to cause a reasonably prudent agent of the Internal Revenue Service to conclude that there was probable cause to believe a felony was being committed within the above-described premises;

3. That although Special Agent Hilker, when executing the search warrant, placed the respondents under arrest for failure to have a Federal Wagering Stamp (a misdeameanor), a reasonably prudent Special Agent of the Internal Revenue Service would have had probable cause to believe that a felony was being committed in the said premises by the respondents, and therefore the Court concludes that the true test of the validity of the arrest is the objective test of a reasonably prudent agent;

4. That there was probable cause for the United States Commissioner to issue the search warrant on the basis of the affidavits of Special Agent Hilker and Special Agent Sparacino, and that the Commissioner's judgment is conclusive in this matter and was not arbitrarily exercised.

FINAL JUDGMENT

The Court having entered its above findings and conclusions, it is

ORDERED AND ADJUDGED that the motions of respondents, GEORGE SABA and EDWARD D. FEURTADO, to suppress and for retur nof seized property, be and the same are hereby denied.

DONE AND ORDERED at Miami, Florida, this 12th day of February, 1960.

/s/ WM. C. MATHES
UNITED STATES DISTRICT JUDGE

APPENDIX B

OPINION OF UNITED STATES COURT OF APPEALS
Filed September 13, 1960

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18417

GEORGE SABA and EDWARD D. FEURTADO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Motion To Dismiss Appeal

Before RIVES, Chief Judge, and TUTTLE and JONES, Circuit Judges.

PERCURIAM:

This appeal is from an order denying motions of the appellants to suppress and for return of property seized, incident to the arrest of appellants for offenses presently being prosecuted by criminal information. The appellee moves to dismiss the appeal on the ground that the judgment of the district court was interlocutory and not appealable. We agree. See **Zacarias v. United States**, 1958, 5 Cir., 261 F. 2d 416, cert. denied 359 U. S. 935; **Peterson v. United States**, 1958 5 Cir., 260 F. 2d 265.

The appeal is therefore

DISMISSED.

APPENDIX C

STATUTES AND RULES INVOLVED
(Applicable Parts Thereof)

Title 26, U. S. C., Section 4411

§4411. Imposition of tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. * * *

Title 26, U. S. C., Section 4412

§4412. Registration

(a) Requirement. — Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district— * * *

Title 26, U. S. C., Section 4901(a)

§4901. Payment of tax

(a) Condtion precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by sec-

tion 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

Title 26, U. S. C., Section 7203

* * * Any person required under this title to pay any estimated tax or tax, * * * who wilfully fails to pay such estimated tax or tax, * * * shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. * * *

Title 28, U. S. C., Section 1254(1)

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of ceritorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 28, U. S. C., Section 1291

§1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 41(e), FEDERAL RULES OF CRIMINAL PROCEDURE, provides as follows:

"(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hear-

ing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 47 of the FEDERAL RULES OF CRIMINAL PROCEDURE states as follows:

"Rule 47. Motions

"An application to the court for an order shall be made by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit."

PROOF OF SERVICE

I, J. EDWARD WORTON, attorney for GEORGE SABA and EDWARD D. FEURTADO, the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 9TH day of January, 1961, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the several parties thereto as follows:

1. On the UNITED STATES OF AMERICA by mailing a copy thereof to the office of E. Coleman Madsen, United States Attorney for the Southern District of Florida, Room 234, Federal Building, Miami, Florida; and

2. By mailing several copies thereof in a duly addressed envelope with airmal postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

J. EDWARD WORTON
Attorney for Petitioners
548 Pan American Bank Bldg.
Miami 32, Florida

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE SARA AND EDWARD D. FEURTADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 643

GEORGE SABA AND EDWARD D. FEURTADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals dismissing the appeal (Pet. App. 5-6) is reported at 282 F. 2d 255.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1960. The petition for a writ of certiorari was filed on January 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).[1]

---

[1] If, as we believe, the order of the district court was one in a criminal case, the petition for a writ of certiorari is

QUESTION PRESENTED

Whether an order denying a motion to suppress evidence obtained under a search warrant is appealable where the motion was made between the defendant's arrest and the filing of an information, and the order was not entered until after the information had been filed.

STATEMENT

Petitioners seek review of the order of the Court of Appeals for the Fifth Circuit dismissing their appeal from an order of the District Court for the Southern District of Florida denying their motions for return of property and suppression of evidence.

On January 9, 1960, Agent Hillker of the Internal Revenue Service obtained a warrant to search premises at 1526 N.W. 33rd Street in Miami, Florida, on the basis of an affidavit stating that he had probable cause to believe that the premises were being used for lottery operations in violation of the Internal Revenue laws (R. 4-12). Hillker stated in his affidavit that a confidential source known to be reliable had informed him that certain representatives of lottery houses met at various places to conduct their operations, and the affidavit detailed personal observations at these places prior to January 9 which tended to confirm that information. It also stated that the confidential source had informed Hillker that

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out of time under Rule 22-2 of the Rules of this Court. As appears from the Discussion (see *infra*, pp. 1-7), this issue is intertwined with the merits of the issue which petitioners raise.

a meeting was to be held at the premises for which the warrant was sought on January 9; and that, on the morning of January 9, he had seen a man carrying a large bulging brown paper sack into the premises from an automobile registered by one of the persons described by the informant. There was also an affidavit that only one of the men named had registered as required by federal law (26 U.S.C. 4412). (R. 12-15). At the hearing on the motion to suppress, it was also shown that, while Hillker was obtaining the search warrant on January 9, other agents observed persons who had been previously named going into the premises (R. 90-91).

After obtaining the warrant, the agents knocked on the door, announced that they had a federal warrant and, after receiving no answer, entered (R. 76-78). They observed lottery paraphernalia in the dining and living rooms (R. 78). A number of persons were found in various rooms and told to return to the dining and living rooms. Agent Hillker then told all of them (except the one who was known to have registered) that they were under arrest for accepting wagers without registering (R. 81-82). Five hundred dollars were taken from the person of petitioner Feurtado and eighteen hundred dollars from the jacket of petitioner Saba, which was either on his person or hanging nearby (R. 64, 82-85). Other items were also seized (R. 16-22).

On January 18, 1960, petitioners moved for the return of the money taken from them and for its suppression as evidence (R. 23-31). The district court denied the motion on February 29, 1960, after a

hearing. The court sustained the validity of the warrant and, in addition, found that the agents had probable cause to arrest petitioners for a felony, so that the search was also justified as incident to a lawful arrest (R. 33-37). In the meantime, on February 8, 1960, an information had been filed against petitioners charging them with violations of 26 U.S.C. 4411 and 4412, for failure to register and pay the tax required of persons engaging in gambling operations.

After petitioners noted an appeal from the order of the district court, the government moved to dismiss the appeal. The court of appeals granted the motion on the authority of its decision in *Zacarias* v. *United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935.

DISCUSSION

1. In *Zacarias* v. *United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935, the court of appeals held that, since a motion to suppress, made after the accused has been arrested and afforded a commitment hearing, is incidental to a pending criminal proceeding, the order on the motion was interlocutory and not appealable. When the case came before this Court on petition for a writ of certiorari, the government, although admitting the conflict with decisions in the Second Circuit[2] and with language in opinions in other circuits,[3] suggested that it was unnecessary to

[2] *In re Fried*, 161 F. 2d 453 (C.A. 2); *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2).

[3] *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9); *United States* v. *Sinciro*, 190 F. 2d 397 (C.A. 3).

resolve the conflict because the contrary decisions had been rendered prior to the decision of this Court in *Carroll* v. *United States*, 354 U.S. 394 (see the government's brief in opposition, No. 672, O.T. 1958). In *Carroll* the Court had held that the appealability of orders granting a motion to suppress must be determined by ascertaining whether the orders "possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders * * * " (359 U.S. 403). In *Zacarias*, this Court cited the *Carroll* decision in its order denying certiorari. 359 U.S. 935.

Although the opinion of the Fifth Circuit in *Zacarias* covers the instant case, the facts here do have one feature that was not present there. In *Zacarias*, which involved narcotics, the motion to suppress could serve no purpose beyond that of preventing the use of the evidence in a criminal action, since there was no property which that defendant could get back and there were no indirect consequences beyond the criminal prosecution. Here, the motion is for the return of money to which petitioners were entitled unless it was otherwise subjected to a lien. As was noted in the government's brief in opposition in *Zacarias*, this Court's earlier decisions in *Perlman* v. *United States*, 247 U.S. 7, and in *Go-Bart Importing Company* v. *United States*, 282 U.S. 344, held that orders on motions for return of property brought before indictment were appealable. And this Court's decision in *Carroll*, in discussing the earlier cases, also recognized a possible distinction between a motion merely to suppress and one for the return of property, saying that

orders with respect to suppression had been held appealable in some instances, "perhaps where the emphasis is on the *return of property* rather than its suppression as evidence." 354 U.S. at 403-404.

On the other hand, the possible distinction between the present case and *Zacarias* is more apparent than real on this record. At one point in the proceedings on the motion to suppress, the district court suggested that, since petitioners were seeking only return of the money, the matter could be settled by returning the money without having it suppressed. When petitioner's attorney pointed out that evidence with respect to the money could still be offered, the district court agreed to go ahead with the hearing (R. 65-73). Thus, the main purpose of the motion in this case was to suppress its use as evidence in a criminal case—as was true of *Zacarias*.

2. Since *Zacarias*, the Second Circuit has reaffirmed its earlier decisions holding that a motion to suppress brought before indictment is appealable, even though an indictment is returned before the motion is decided. *Di Bella* v. *United States*, decided November 23, 1960, pending on petition for a writ of certiorari, No. 574, this Term (raising another issue).[4] This decision, which involved a motion to suppress relating to narcotics, is in direct conflict with *Zacarias* and the decision in this case. While *Zacarias* was not mentioned by the Second Circuit, both the decision in *Zacarias* and the citation of *Carroll* by this Court in

[4] Although the Second Circuit held the order refusing suppression to be appealable, it decided against the defendant on the merits.

denying certiorari were called to the attention of the Second Circuit in the government's brief.

3. In these circumstances, we feel bound not to oppose the granting of the petition, although we believe that the ruling below is correct and in accord with the principles embodied in this Court's *Carroll* opinion. The problem is not major but it is recurrent.[5] Since the conflict between the Second and Fifth Circuits has recently been confirmed, with full awareness of the *Carroll* decision, it seems appropriate for this Court to resolve that conflict (cf. *Lott* v. *United States*, No. 238, this Term, certiorari granted, 364 U.S. 813), perhaps by summary affirmance. See *United States* v. *Lone Motor Co.*, 344 U.S. 630.[6]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1961.

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[5] The *Zacarias*, *Di Bella*, and instant cases have come before the courts of appeals since *Carroll* (decided June 21, 1957).

[6] Under *Carroll*, whether an order on a motion to suppress is immediately appealable turns, not on any mechanical test of whether it is filed before or after indictment, but upon the effect of the order in the criminal proceeding. Here, the purpose of the motion was primarily to prevent the use of the evidence in the criminal case, an issue which can be reviewed if a final judgment of conviction is obtained.

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